LEE CHOO LAI & ORS

v.

PP

HIGH COURT MALAYA, TEMERLOH
NIK HASHIM J
[CRIMINAL APPEAL NO: 41-77-1999]
25 APRIL 2000

CRIMINAL PROCEDURE: *Charge - Framing or particulars - Common Gaming Houses Act 1953, s. 7(2) - Omission to state "di tempat awam" (in public place) after "bermain judi" (gaming) - Whether disclosed an offence under the law - Whether words thereof material to charge - Whether omission curable under ss. 156 and 422 Criminal Procedure Code*

CRIMINAL PROCEDURE: *Conviction - Conviction based on guilty plea - Whether appellants' barred from appealing against conviction - Criminal Procedure Code, s. 305 - Whether conviction a nullity - Whether guilty plea real - Whether guilty plea must be real for s. 305 to apply*

The appellants, following their guilty plea, were convicted and fined for an offence under s. 7(2) of the Common Gaming Houses Act 1953 ('the Act') in the magistrate's court. The appellants appealed against their conviction on the ground that the framing of the charge disclosed no offence under the Act. That was because the words "di tempat awam" (in public place) were not mentioned after the words "bermain judi" (gaming) in the said charge.

Held:

[1] The charge as framed disclosed no offence under the law. Gaming is not *mala per se*. It is only an offence when it is played in a common gaming house (s. 6(1)) or in any public place (s. 7(2)) of the Act.

[2] The words "di tempat awam" are material to the charge. Without mentioning the said words after the words "bermain judi", the charge could not stand as gaming under s. 7(2) of the Act. It was not an offence unless it was played in a public place.

[3] There was also no evidence from the facts tendered by the prosecution to show that the "Restoran" was a place to which the public had access. In the absence of such proof the court could not presume the "Restoran" as a public place. Thus, the charge was defective. It had misled the unrepresented appellants who did not have the benefit of legal advice before admitting to the charge.

[4] The appellants' plea of guilty and their conviction to the erroneous charge had therefore occasioned a failure of justice which ss. 156 and 422 of the Criminal Procedure Code ('Code') could not save. Since s. 7(2) of the Act created gaming in public an offence, it was therefore imperative that the charge did state the offence and the law precisely and accurately.

[5] An appeal would lie herein even though the appellants were convicted on their own guilty plea. The appellants' guilty plea was not real. In fact, their guilty plea was no plea at all as they could not plead guilty to the commission of an act which was not an offence in law. Consequently, the appellants were not barred by s. 305 of the Code for launching an appeal against their conviction following their own plea of guilty. For the bar under s. 305 to apply, the plea of the accused must be real.

[Appeal allowed.]

Case(s) referred to:
Low Seng Wah v. PP [1962] 28 MLJ 107 ***(refd)***
PP v. Zainal Abidin Mohd Zaid [1993] 1 CLJ 148 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Tan Thian Sang alias Tan Yun Guan v. PP [1959] SCR 5 ***(refd)***
Timbalan Pendakwa Raya lwn. Thoo Yee Thye & Yg Ln [1991] 3 CLJ 2830 ***(refd)***
Wong Siak Fon v. PP [1972] 1 MLJ 203 ***(refd)***

Legislation referred to:
Common Gaming Houses Act 1953, ss. 6(1), 7(2)
Criminal Procedure Code, ss. 152(1), (4), 156, 305, 422
Prevention of Corruption Ordinance 1950, s. 3(a)

Other source(s) referred to:
Criminal Procedure, 1998, Hamid, 2nd edn, p 725

For the appellants - Francis Tan; M/s Rosni, Francis Tan & Ho
For the pp - Iskandar Ali Dewa; DPP

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

The appellant with five others were each fined RM3,000 by the magistrate's court, Jerantut following their plea of guilty for an offence under s. 7(2) of the Common Gaming Houses Act 1953 (Act 289) (the Act). They were unrepresented before the learned magistrate. The charge against them reads:

> Bahawa kamu bersama-sama pada 31.10.99 lebih kurang 1640 hrs di Restoran How Kee, Lot 10 Sungai Jan, Jerantut, di dalam Daerah Jerantut dalam Negeri Pahang Darul Makmur, telah didapati bermain judi, oleh yang demikian kamu

> telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 7(2) Akta Rumah Judi Terbuka 1953 (Akta 289)

They appealed against both the conviction and sentence of the lower court. Before me, learned counsel for the appellants withdrew their appeal against the sentence but proceeded with the appeal against conviction only contending that the conviction was a nullity on the ground that the charge disclosed no offence under the Act.

The learned deputy public prosecutor, on the other hand, argued that the 'restoran' mentioned in the charge is a public place to which the public has access and failure to state the words 'di tempat awam' (in public place) after the words "bermain judi" (gaming) was not fatal as it was immaterial and curable under ss. 156 and 422 of the Criminal Procedure Code (Act 593) (the Code) respectively. He cited *Low Seng Wah v. PP* [1962] 28 MLJ 107 in support.

Having considered the arguments advanced by both parties and having carefully read the authorities, I came to the conclusion that this appeal must succeed. I quashed the conviction and ordered the fine to be refunded to the appellants through their counsel.

I now give my reasons.

With respect, I agree with the contention of the learned counsel. The charge as framed discloses no offence under the law. Gaming is not *mala per se*. It is only an offence when it is played in a common gaming house (s. 6(1)) or in any public place (s. 7(2)) of the Act (see *Timbalan Pendakwa Raya lwn. Thoo Yee Thye & Yg Ln* [1991] 3 CLJ 2830).

Section 152(1) of the Code states:

> Every charge under this Code shall state the **offence** with which the accused is charged.

Whereas s. 152(4) demands that:

> The **law and section of the law** against which the offence is said to have been committed shall be mentioned in the charge (Emphasis added)

In my view, the words "di tempat awam" are material part of the charge. Without mentioning the words "di tempat awam" after the words "bermain judi" the charge cannot stand as gaming under s. 7(2) of the Act is not an offence unless it is played in a public place. Morever, there is no evidence from the facts tendered by the prosecution to show that the 'restoran' is a place to which the public had access. In the absence of such proof the court cannot presume the 'restoran' as a public place. Thus, the charge is defective.

It had misled the unrepresented appellants who did not have the benefit of legal advice before admitting the charge.

The appellants' plea of guilty and their conviction to the erroneous charge had therefore occasioned a failure of justice which ss. 156 and 422 of the Code cannot save. Since s. 7(2) of the Act creates gaming in public an offence, it is therefore imperative that the charge does state the offence and the law precisely and accurately.

Low Seng Wah, *supra*, is not applicable in this case. There, the words "as an inducement" or alternatively, "reward" have been omitted immediately preceding the words, "for showing favour ..." were held by Neal J not to be essential part of the charge under s. 3(a) of the Prevention of Corruption Ordinance 1950 (No. 5/50) as the element of inducement is already included in the allegation in the, "did corruptly accept".

An appeal will lie in the instant case even though the appellants were convicted on their own plea of guilty. The appellants' guilty plea is not real. Their plea of guilty is no plea at all as they could not plead guilty to the commission of an act which is not an offence in law. (See *Sau Soo Kim v. PP* [1975] 2 MLJ 134 at p. 136 para. A; *PP v. Zainal Abidin Mohd Zaid* [1993] 1 CLJ 148 at p. 149 para. b).

The charge is irregular which affected the legality of the conviction resulting in the failure of justice. The appellants' plea of guilty is not real and their subsequent conviction is therefore a nullity. Consequently, the appellants are not barred by s. 305 of the Code for launching an appeal against their conviction following their own plea of guilty.

Section 305 states:

> When an accused person has pleaded guilty and been convicted by a Magistrate on that plea, there shall be no appeal except as to the extent or legality of the sentence.

In order for the rule of bar under s. 305 to apply, the plea of the accused has to be real: *Tan Thian Sang alias Tan Yun Guan v. PP* [1959] SCR 5; *Wong Siak Fon v. PP* [1972] 1 MLJ 203, and see Hamid's, *Criminal Procedure*, 2nd edn, 1998 p. 725. In the present case, the guilty plea of the appellants is not real.

In the circumstances, I allowed the appeal and made the orders accordingly.